United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

76-1201

To Be Argued By
THOMAS A. HOLMAN
MARK G. BARRETT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee,

-against-

FRANK GRADY and
JOHN JANKOWSKI,

Defendants-Appellants.

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

(D.C. Crim. No. 76 Cr. 227)

JOINT BRIEF ON BEHALF OF APPELLANTS
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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the indictment upon which the government proceeded to trial was time barred.

2. Whether the evidence was sufficient to support a conviction of appellants with respect to violating 18 U.S.C. §922(m) in Counts 2-8 and 15-17.

3. Whether Frank Grady and John Jankowski were deprived of a fair trial as a result of the following errors:

    a. the improper admission of hearsay testimony in the form of police reports from a foreign police agency;

    b. the improper admission of so-called "subsequent similar acts" testimony;

4. Whether Frank Grady was deprived of a fair trial as a result of the trial court's failure to instruct the jury that Grady did not require a license to export as an aider and abettor of the exporter.

PRELIMINARY STATEMENT

Defendants-appellants Frank Grady and John Jankowski appeal from a judgment of conviction entered on March 12, 1976, by the United States District Court for the Southern District of New York (Brieant, J.).

The judgment of the District Court (R. 10, 11):*

(a) upon a jury's verdict, convicted Grady on Counts 1, 2-8, 15-17, and 19 of the indictment; and sentenced Grady to a term of two years in prison on Count 19, and suspended all but four months, placed Grady on probation for forty months on expiration of confinement. Imposition of sentence on Counts 1, 2-8, 15-17 is suspended with probation of forty months to run concurrently with the sentence of probation on Count 19.

(b) upon a jury's verdict, convicted Jankowski on Counts 1, 2-8, 15-17 of the indictment; and sentenced Jankowski to a term of three years.

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* Appellants are using a deferred appendix. References therefore are to the Record and Supplemental Record on Appeal. References to the exhibits are cited as follows: "GX" refers to government's exhibits. Each reference is prefaced by the number of the document listed in the Index to the Record by ("R.") or Index to the Supplemental Record ("SR."). References to the trial transcript are similarly prefaced and refer to the page number ("T.").

Pre-Trial Proceedings

Although there were several pre-trial motions, it is only necessary to refer to those dealing with the sufficiency of the false entry counts and the failure to allege the name of the object of obstruction of justice. Those motions are discussed in Points I and II.

Trial Proceedings

The trial against Grady and Jankowski commenced on March 8, 1976 before Judge Brieant and a jury. At the conclusion of the government's case, the court denied all defense motions for judgment of acquittal (R. 16, T. 612).

The charge of the trial court is discussed in the brief on behalf of Grady which addressed certain errors in the charge. We discuss below (Point V) the failure of the trial court to properly define the elements of unlawful export.

The case was submitted to the jury on March 12, 1976. The same day, the jury returned verdicts of guilty on all counts submitted for their consideration.

Post-Trial Proceedings

Subsequent to trial, Grady and Jankowski moved for a judgment of acquittal raising the ground of statute of limitations which was raised as an affirmative defense during the course of the trial. Judge Brieant denied this motion on April 12, 1976 (SR. 4).

STATEMENT OF THE EVIDENCE AS TO JANKOWSKI AND GRADY

Introduction

It is a principal burden of this brief to focus clearly on the joint venture of a group of men to purchase weapons from a licensed firearms dealer. The summary of the evidence should demonstrate that these men had a common plan to purchase, and in doing so, they fully identified themselves in a Federal Firearms Record Book which left a trail to their doors. These were the acts of men which do not suggest a purpose in violation of the Gun Control Act but a purpose of compliance.

A. The General Background

In the early months of 1970 a group of men gathered in Yonkers, New York to discuss the problems which beset the people of Northern Ireland. They shared common heritage and common sympathies. The meeting was attended by Frank Grady, John Casey, Thomas Duffy, John O'Brien, William Dennehy and Luke Dalton (R. 16, T. 225-26). Frank Grady announced that he would be the chairman of the group, and John O'Brien was angered that this position was going to Grady and not to him. John Casey agreed to be the secretary and William Dennehy agreed to be the financial secretary. Most of the meetings of this group were held at the Chippewa Club in Yonkers (R. 16, T. 226-27). These men worked together to raise money for the people of the six counties of Northern Ireland by putting on shows and dances (R. 16, T. 72).

In March of 1970 the discussion turned to the purchase of M-1 carbines. In conversation with Grady, Casey agreed then that he would be "willing to sign" (R. 16, T. 228). Grady told Casey that O'Brien had been frequently visiting the J & J Bait & Tackle Shop in Yonkers to discuss with the owner, a licensed federal firearms dealer, the purchase of firearms, and that O'Brien had told Duffy that the owner was willing to sell M-1 carbines (R. 16, T. 229).

On another occasion in March, 1970 Grady, Duffy, Martin Lyons, and Casey had a meeting and then travelled to the J & J Bait and Tackle Shop. Duffy and Lyons alone conversed with the owner and Lyons gave the owner a sum of money in cash. (R. 16, T. 233)

In May of 1970 Grady, Dalton, O'Brien, McCarthy, [illegible] and Dennehy had a meeting at Dennehy's apartment in Yonkers. The "conditions" in Ireland were discussed. When the discussion turned to the purchase of firearms at this meeting, Dennehy eagerly volunteered that he would help and would "sign" for rifles (R. 16, T. 144).

B. Signing the Federal Firearms Record in May 1970

Following the March and May, 1970 meetings when Grady, O'Brien, McCarthy, Dennehy, and Casey had agreed to obtain firearms, these men on various occasions went to the J & J Bait and Tackle Shop in May of 1970. John Jankowski, the owner and licensed federal firearms dealer of the J & J Bait and Tackle Shop ("J & J") had told O'Brien, Lyons, and Duffy that each man would have to sign his Federal Firearms Record (GX 9),

and would have responsibility for his weapon (R. 16, T. 76, 115, 669).

1. Dennehy

William Dennehy went to "J & J" in the company of Grady and Dalton and recalls that Casey, O'Brien, and McCarthy were together with him in "J & J." The owner, John Jankowski, was also in the store, and told Dennehy to sign his name and enter his address, social security number, and date of birth in the Firearms Record which Dennehy did do truthfully (R. 16, T. 147-48, 167). Grady paid Jankowski about $150 for the one rifle, and Dennehy told Grady then that the price was high (R. 16, T. 149). Dennehy did not see the rifle,but he was aware of the purpose of the transaction, and was aware that weapons would be removed from the store (R. 16, T. 155, 174, 299).

2. Casey

John Casey went to "J & J" together with Frank Grady in May of 1970 to sign the Firearms Record. Casey signed his name in two spaces in the record and entered his address, social security number, height and weight truthfully in the spaces indicated by Jankowski (R. 16, T. 236, 297). No money was exchanged on that occasion, but Casey was at "J & J" with Lyons and Duffy when Lyons paid Jankowski well over $1,000, though none of this money was contributed by Casey. Casey did not purchase the

weapons for himself.* (R. 16, T. 237)

After Casey left "J & J" on the day he signed for the firearms, Grady and Casey went to a bar where Dalton, O'Brien, and McCarthy were already there, and Casey was told that O'Brien was unwilling to sign (R. 16, T. 238). Casey became angry over O'Brien's reluctance and persuaded O'Brien not to back down from his agreement to sign at "J & J" (R. 16, T. 238, 287).

Casey, aware of the conflict in Northern Ireland, felt compassion for the minority in Northern Ireland. His family's background and heritage had been a factor in his decision to participate in the purchase of guns from "J & J" in May of 1970. He was a willing participant in this group, and in the weeks following the day he signed, he was in close contact with the other men together with whom he had formulated the plan to purchase the firearms (R. 16, T. 286-87, 292).

In June Casey signed for a single carbine at "J & J" which he received and then turned over to Grady the next day (R. 16, T. 243).

3. O'Brien and McCarthy

O'Brien, who had introduced Jankowski to Lyons some weeks before, went to "J & J" with McCarthy. O'Brien had been to "J & J" many times before to purchase lottery tickets (R. 16,

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* The following question was asked by Mr. Carey, the Assistant U.S. Attorney, with Casey giving the following answer:

"Q. Were the weapons which you signed for weapons which you purchased for yourself?

A. No."

(R. 16, T. 237)

T. 84). O'Brien was first reluctant to accompany McCarthy but after the discussion with Casey he proceeded in the company of Grady and McCarthy to "J & J" (R. 16, T. 74, 238, 287). Alone with McCarthy, O'Brien entered "J & J" and one of them simply told Jankowski that they were in his store to "sign the book" (R. 16, T. 79). No money passed between Jankowski and these two men and the rifles for which both McCarthy and O'Brien had signed the Firearms Record twice were not shown to either man (R. 16, T. 80). Both men signed their true names and entered their addresses.

O'Brien, who had discussed the signing of the Firearms Record at a tavern in Yonkers with Lyons, Grady, Dennehy, and Casey knew what he was doing when he went into "J & J" to sign the record (R. 16, T. 106, 121, 122). O'Brien understood that his signing the book would transfer ownership of guns from Jankowski (R. 16, T. 108-09).

4. Grady and Jankowski

Grady also signed his name and entered his address in the Firearms Record in May of 1970 at "J & J" in two spaces (R. 16, GX 9, T. 363, 371). The information which Grady entered in the Firearms Record was truthful (R. 16, GX 9, pps. 8-9, T. 371). A handwriting expert called to testify by the government concluded that Grady's handwriting in the Firearms Record was very naturally produced, and Grady by his method of writing did not attempt to confuse or deceive (R. 16, T. 371).

Jankowski also signed the "J & J" Firearms Record.

Jankowski explained that he wanted to give a weapon to the club to which he believed the guns were going as a good-will gesture (R. 16, T. 649). All of the weapons which were signed for were received by Jankowski from Roskin Brothers, wholesale distributors of sporting goods (R. 16, T. 40, 666). Roskin Brothers shipped 12 M-1 carbines to Jankowski on May 4, 1970 (R. 16, GX 1, T. 51).

C. Signing of Federal Firearms Record in July of 1970

Ten M-1 Carbines manufactured by Universal were shipped to "J & J" by Roskin Brothers in July of 1970 (R. 16, GX 2, T. 53, 60).

1. McMorris

Edward McMorris, a construction electrician, met Grady on a construction job sometime in 1970 in Tarrytown, New York (R. 16, T. 182-83). McMorris had intended that he be signing for weapons as a purchaser of certain guns that would go overseas, presumably to Northern Ireland (R. 16, T. 185, 207). McMorris was aware that he would not actually receive the weapon, and with that knowledge McMorris went to "J & J" in July of 1970 and signed his name in two places in the Firearms Record of "J & J" (R. 16, GX 9, pps. 10-11, T. 187, 200). He also entered his address, date of birth and social security number on two lines of the Firearms Record opposite his signature and all the information was accurate and truthful (R. 16, GX 9, pp.s 10-11, T. 200, 211). On a piece of paper McMorris

made a record of the serial numbers of the two guns (R. 16, T. 202). McMorris did not see these two weapons or see any money change hands for the weapons corresponding to the serial numbers entered in the record.

2. Dennehy

Again in July of 1970 Dennehy went to "J & J" with Grady to sign for another rifle and signed his name, entered his social security number, address, and date of birth (T. 153). There was little discussion on this occassion at "J & J" because Dennehy knew what he was there to do (R. 16, T. 153). He did not see the weapon and does not recall whether Grady paid for the weapon, but he, McMorris, paid no money (R. 16, T. 155) when he signed, as he did in May. The information pertaining to his identity was accurately entered in the record (R. 16, T. 179).

D. The Dates of Entries in the Firearms Record

The dates in the Firearms Record were recorded by Jankowski (T. 642) and not by McMorris (T. 201), Casey (T. 282), Dennehy (T. 164-65) or O'Brien (T. 92). Casey had "no idea" who entered the dates in the margin of the Firearms Record, but signed on one day notwithstanding there being the dates of May 6 and May 8 to the left of his signature in the spaces he signed in the Firearms Record (R. 16, GX 9, pps. 8-9, T. 283).

E. The Transfer of Ownership Documents

At a meeting within two to four weeks of early May of 1970 at the Chippewa Hall, "receipts" which contained a name of a person to whom a weapon had been transferred were given to Casey, O'Brien, and Grady by Lyons (R. 16, T. 81, 93, 240). Lyons told them that the name on the "receipt" was the name of a deceased person, and to hold onto the "receipt" in the event they were questioned about signing for the weapons (R. 16, T. 239, 240).

Dennehy received a "receipt" from Grady after he signed at "J & J" in May of 1970, and he kept the "receipt" for six months before he threw it out (R. 16, T. 149). In July of 1970 Dennehy also received a "receipt" from Grady indicating that Dennehy had transferred the weapon to another person, and after six months threw that paper out (R. 16, T. 154, 155). McMorris was told before signing that we would receive this type of document, and after reminding Grady, did receive a paper writing which McMorris signed, dated, and entered the serial number of the weapon he had signed for in July of 1970. McMorris said he had received this document to ensure that he would be able to purchase a semi-automatic weapon in the future (R. 16, T. 189, 190). The signature of Michael O'Callahan appeared on the document (R. 16, GX 11). McMorris did not know O'Callahan (R. 16, GX 11, T. 204).

John Jankowski was not present on the occasions when these documents were given to McMorris, Casey, O'Brien, Dennehy or Grady (R. 16, T. 93, 149, 179, 202-03).

F. Removal of .30 M-1 Carbines from "J & J" in May of 1970

Casey, Lyons and Grady went to "J & J" on a Saturday night in the end of May of 1970, arriving at the store after 9:00 o'clock in the evening. Jankowski opened the front door of the store for them, and accompanied the three men to the back of the store where there were stacks of unopened cardboard boxes. Lyons, Casey, and Grady loaded the boxes into the cars of Grady and Casey. Grady and Casey followed Lyons driving a third car to a residential area past Tibbots Brook Park where Casey and Grady transferred the boxes to Lyons' car (R. 16, T. 240, 241).

These boxes were not opened at the time and Casey assumed that there were over twenty-five carbines in the cardboard boxes he helped to move on that night (R. 16, T. 331).

G. Export of M-1 Carbines from the United States

Prior to the time in May of 1970 when Dennehy signed the Firearms Record, Grady told Dennehy that the weapons were going to Ireland (R. 16, T. 156) and O'Brien had discussed with others that the guns would be sent overseas (R. 16, T. 127).

Grady told Casey that on an occasion Lyons wore priest's clothing and went to the "docks" and shipped two trunks to Ireland by boat (R. 16, T. 263, 264). Lyons, a member of the Irish Northern Aid Committee in the Bronx, told Casey that he had once visited Irish Republican Army "soldiers" in the hills in Ireland (R. 16, T. 264,265).

In the winter of 1971 Grady pointed to a newspaper photograph from the Daily News and said to Casey that there is one of the M-1 carbines that was "signed for." The caption of the article indicated that the article was concerned with the Irish Republican Army (R. 16, GX 18A, T. 266, 267). The government ballistics expert testified that the weapon in the picture had a typical configuration of an M-1, M1A1, M-2 or M-3 carbine (R. 16, T. 463).

Richard Anderson, an officer in charge of the Arms Department of the Royal Ulster Constabulary, is responsible for arranging the disposal of firearms which having come into possession of the police (of Northern Ireland) are no longer required for police purposes (R. 16, T. 430-32). Anderson identifies five M-1 carbines as carbines to which a label incased in metal and sealed was attached to the carbines under his direction and supervision by a member of his staff in Northern Ireland and a special mark on the bottom of the trigger of the weapons was put on in his presence by a police armorer (R. 16, GX 13-17, 7 and 8, T. 432-35). These carbines came into Anderson's possession within the last twelve months and before that the weapons were used by other members of the Royal Ulster Constabulary (R. 16, T. 441).

H. The Records of "J & J" and Enforcement of the Gun Control Act

1. Agent Quinn

Laden with the serial numbers of seven weapons,

Special Agent Thomas Quinn of the Bureau of Alcohol, Tobacco and Firearms visited Jankowski at "J & J" in July, 1973 to investigate the purchase of M-1 carbines. Jankowski produced his Firearms Records, and Quinn with Jankowski's consent took the record book back to his office for further study (R. 16, T. 513-14 and GX 9). About six weeks later Quinn returned to question Jankowski about the sale of twenty-two M-1 carbines (R. 16, T. 515 and GX 9, pps. 8-11). Jankowski told Quinn he ordered the weapons from Roskin Brothers (R. 16, T. 516). A month later Quinn returned again and talked more with Jankowski. Quinn told Jankowski that he did not believe him. Jankowski told Quinn the two men who had inquired about the purchase wanted submachine guns and hand grenades which Jankowski did not supply to anyone (R. 16, T. 517). Then Jankowski told Quinn that the two men told him that other men would come to "J & J" with proper identification and this did happen in May and July of 1970 (R. 16, T. 515). Jankowski admitted to Quinn that he had signed the record himself (R. 16, T. 518). Quinn testified that the information which Jankowski had entered in his Firearms Record exceeded that required by the regulations pertaining to the Firearms Record (R. 16, T. 540).

2. George Clearwater

In May or June of 1970 Clearwater, then a licensed firearms dealer, discussed with Jankowski obtaining from 100 to 500 M-1 carbines. Jankowski had a buyer for a large quantity of weapons and Clearwater suggested to Jankowski that the sale be "unregistered" (R. 16, T. 408). After this conversation

Clearwater telephoned Quinn and told him what had transpired between him and Jankowski (R. 16, T. 385). Quinn told Clearwater to follow through with his transaction with Jankowski (R. 16, T. 397). Clearwater then later called Jankowski who told Clearwater that he had obtained the weapons from Florida at a cheaper price (R. 16, T. 388). Jankowski told Clearwater that the weapons he would order from Clearwater had a ship waiting for their delivery (R. 16, T. 389).

SUMMARY OF ARGUMENT

The trial court agreed with appellants that the statute of limitations presents a substantial issue in this case. (R. 16, T. 622 - 623). The appellants contend that the superseded indictment was never dismissed; that there was never any findings of a defect in any count of the superseded indictment; that the trial court in fact ruled that the superseded indictment was sufficient on its face; and that 18 U.S.C. §3288 supports the position of appellants. 18 U.S.C. §3282 (the five year limitation) has expired and the superseding indictment is time barred.

The charge of making false or imappropriate entries in the Federal Firearms Record was not sustained by the evidence. The evidence on the other hand supports a view that the appellants complied with the statute to the extent reasonably contemplated by the objectives sought to be achieved by 18 U.S.C. §922 (m).

Appellants contend that error was committed which denied them of a fair trial by the admission of hearsay police reports from a foreign law enforcement agency and that the admission of "subsequent similar acts" testimony was relevant only on the issue of the criminal character of the accused.

Appellant Grady above convicted on unlawful export of firearms urges that the trial court committed error in its failure to fairly instruct the jury on the elements of the export offense in that Grady's failure to have a license to export was irrelevant as an aider and abettor of the exporter.

POINT I

THE INDICTMENT UPON WHICH THE GOVERNMENT PROCEEDED TO TRIAL WAS TIME BARRED.

> ...I don't concede that the *Moskowitz** case states the law correctly. I think if it does you are probably right...I think the situation in this Circuit is if (the Government) find an indictment is improperly drawn (the Government has) an affirmative duty to file a superseding indictment because there is no power on the part of the Court to amend an indictment...I don't think it is necessary to dismiss the first indictment before you file a superseding indictment.

Judge Brieant on ruling upon the defendants' affirmative defense of the statute of limitations. (R. 16, T. 622, 623)

The defendants Grady and Jankowitz jointly raised the affirmative defense of the statute of limitations and raised the issue again in the post-trial Rule 29(c) of the Federal Rules of Criminal Procedure motion for a judgment of acquittal.

The first indictment in this case 75 Cr. 435 was filed on May 2, 1975. On March 8, 1976 the indictment 76 Cr. 277 was filed and the defendants were tried upon this superseding indictment.

The return of this superseding indictment by the grand jury came after the applicable five year statute of limitations, 18 U.S.C. §3282, had expired. The government conceded during the course of the trial that the superseding indictment was filed beyond a five year limitation:

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* *United States v. Moskowitz*, 356 F. Supp. 331 (E.D.N.Y. 1973)

> Mr. Carey: ... The action, as Mr. Holman concedes, was instituted within the statutory limitation of five years, if that is the correct limitation. The superseding indictment had no effect to discontinue the prosecution which had been instituted, but in fact continued. In fact, the superseding indictment is something which came about not because the Government wanted to add charges, but in fact to comply with the Court order, which was the result of a defense motion, as well as to comply in other respects with motions made by the defendant which the Court had not at that time had an opportunity to act upon.* (R. 2, T. 619)

The statute of limitations may only be extended by a specific "saving" statute, and that statute is contained in 18 U.S.C. §3288. The statute provides as follows:

> § 3288. Indictment were defect found after period of limitations
>
> Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, or an indictment or information filed after the defendant waives in open court prosecution by indictment is found otherwise defective or insufficient

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* The government was required by Court order of February 26, 1976 (SR. 1) to state the name of a person alleged to be the object of obstruction of justice in Court 29 of the superseded indictment (SR. 3, Indictment 75 Cr. 435, p. 7). Prior to commencement of the trial Court 20 (the obstruction of justice count) in the superseding indictment was dismissed with prejudice for failure of the government to comply with the Court order (R. 16, T. 16).

As to the sufficiency of the superseded indictment (SR. 3, Indictment 75 Cr. 435) Judge Brieant stated at a hearing on March 4, 1976 relating to defendant Grady's motion to dismiss the *superseded* indictment for failure to state an offense with respect to Counts two-eight een therein: "...as I think it is quite clear on its face the indictment is sufficient and the proper time to make a motion based on the fact that the government has insufficient proof is when the government rests." (SR. 2, T. 21)

> for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or, if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations.

In *United States v. Moskowitz*, 356 F. Supp. 331 (E.D.N.Y. 1973), the first indictment returned on April 13, 1972 charged income tax evasion in an eight count indictment for the years 1965 through 1968. A superseding indictment was filed on May 9, 1972 altering the first and second count of the original indictment and were altered to reflect a change in the amount of tax due in one count and deleting an allegation and adding a claim as to taxable income in the second count as to the 1965 calendar year. The government's theory of analogizing the superseding indictment to a dismissal and reindictment pursuant to 18 U.S.C. §3288 was rejected in *Moskowitz*:

> The government is in error. 18 U.S.C. §3288 reads "whenever an indictment is *dismissed* . . . " (emphasis supplied). Here, as noted there has been no dismissal to trigger the statute. Since the language of the predecessor to 18 U.S.C. §3288 has been strictly interpreted, *United States v. Durkee Famous Foods, Inc.*, 306 U.S. 68, 59 S.Ct. 456, 83 L.Ed. 492 (1939), the government's reliance on a superseding indictment to activate the statute must be rejected. The proper course for the government in such cases is to dismiss the initial indictment, 72 CR 431, Rule 48(a), F.R. Crim.P., United States v. Chase, 372 F.

> 2d 453 (3 Cir.), cert. denied 387 U.S. 907, 87 S.Ct. 1688, 18 L.Ed.2d 626 (1967); and reindict within six months of the dismissal. (*United States v. Moskowitz, supra* at p. 332)

In *United States v. DiStefano*, 347 F.Supp. 442 (S.D. N.Y. 1972) (Metzner, J), the Court dismissed an indictment for failure to prosecute. Shortly after the statute of limitations expired, the Government moved to reinstate the indictment. In denying the motion, the Court said, at pages 444-445:

> The motion must be denied because, the statute of limitations having run, the court is without power to reinstate the indictment. When an indictment is *dismissed* because of technical defects or irregularity in the grand jury, a new indictment may be returned within six months of the date of dismissal even though the statute of limitations has run or might run in the interim. 18 U.S.C. §§3288, 3289. However, where the indictment has been dismissed for failure to prosecute, reindictment is not possible once the statute of limitations expires. See *United States v. Strewl*, 99 F.2d 474 (2d Cir. 1938), *cert. denied*, 306 U.S. 638, 59 S.Ct. 489, 83 L.Ed. 1039 (1939; *United States v. Moriarty*, 327 F.Supp. 1045 (E.D.Wis. 1971). *Similarly, just as the grand jury lacks power to reindict*, so also the district court lacks power to reinstate an indictment dismissed for lack of prosecution once the statute of limitations has run. See *United States v. McCarthy*, 445 F.2d 587 (7th Cir. 1971); *United States v. Liquori*, 430 F.2d 842, 851 (2d Cir. 1970) (concurring opinion of Lumbard, S.Ct. 1614, 29 L.Ed.2d 118 (1971). (emphasis supplied.)

As in *Moskowitz*, the Court here held that §3288 only applies where the first indictment was *dismissed* for defects, and in the absence of §3288, a grand jury cannot re-indict after the statute of limitations has expired.

The holding in *United States v. Moriarty*, 327 F.Supp. 1045 (E.D.Wis. 1971), cited in *DiStefano* is even more compelling because in that case the first indictment was *dismissed* on the Government's motion based upon "the interests of justice". The Government then re-indicted after the statute of limitations had expired. In granting the defendant's motion to dismiss the second indictment, the court said at pages 1047-1048:

> A statute of limitations is to be construed liberally in favor of a criminal defendant. *Waters v. United States*, 328 F.2d 739, 742 (10th Cir. 1964). Prior to 1964, 18 U.S.C. §3288 provided for reindictment, notwithstanding the running of the period of limitations, "whenever an indictment is dismissed for any error, defect or irregularity with respect to the grand jury, *or is found otherwise defective or insufficient for any cause* * * *." (Emphasis added.) See *United States v. Bair*, 221 F.Supp. 171 (E.D.Wis. 1963); *United States v. Hoffa*, 196 F.Supp. 25 (S.D.Fla. 1961). However, as presently worded, §3288 allows reindictment, with one exception, only after dismissal of an indictment for "error, defect or irregularity with respect to the grand jury."
>
> * * *
>
> In my opinion, the defendants' position must be sustained. Section 3288 is specific in its requirement that an otherwise time-barred count can be allowed only if the earlier dismissal related to irregularities occurring in connection with grand jury proceedings. In the absence of a showing that the dismissal was for such reason, it cannot be held that the running of the period of limitation has been tolled. The prosecution's statement that the "interest of justice" required the dismissal in question is simply too sweeping to save the government's action. The defendants' motions to dismiss the first counts of the indictments in 70-Cr-85 and 70-Cr-86 will be granted. See *United States v. Garcia*,

412 F.2d 999 (10th Cir. 1969); *cf. United States v. Porth*, 426 F.2d 519 (10th Cir. 1970).

The construction placed on 18 U.S.C. §3288 by the trial court is inconsistent with the very reason that the statute exists which is the "saving" intention of the statute of limitations under the specific circumstances set forth in the "saving" statute. The trial court construed §3288 to mean that the government may "find" an indictment "defective or otherwise insufficient", but common sense and the legislative history of the statute suggests otherwise.

The legislative history of §3288 upon upon which construction of this statute should be based is contained in two letters from the Attorney General of the United States which did accompany the original predecessor statute in 1934 -- one on January 3, 1934 to the Chairman, Committee on the Judiciary, *House of Representatives, House Report No.* 707, Vol 861 (S. 2460), 73rd *Cong.*, 2d *Session* and another on January 17, 1934 to the Chairman, Committee on the Judiciary, U. S. Senate.

The letter of January 3, 1974 from Attorney General Cummings to Chairman Sumners is as follows:

January 3, 1934.

Hon. Hatton W. Sumners,
Chairman Committee on the Judiciary
House of Representatives, Washington, D.C.

MY DEAR MR. CHAIRMAN: I enclose herewith a copy of H.R. 10638, which was introduced in the Seventy-second Congress on the recommendation of this Department. This bill is designed to accomplish two principal purposes:

1. Section 1 would require attacks on indictments, based on alleged irregularity in the drawing or impaneling of a grand jury or upon the alleged disqualification of a grand juror, to be filed either before, or within 10 days after, arraignment; and, further, would in such instances stop the statute of limitations from running against another indictment until the motion or plea is finally disposed of and there is reasonable opportunity to obtain another indictment, if the first one is set aside. These motions are highly technical and dilatory and are often made in the hope that before they are finally disposed of the statute of limitations will have run against another indictment. There have been cases where motions of this kind were not made until months after the original indictments were returned.

2. Section 2 would prevent the disqualification of one or more grand jurors from invalidating an indictment if 12 or more jurors not shown to be disqualified concurred in the finding of the indictment. This section, as drawn, throws the burden upon the Government, where the disqualification of one or more grand jurors has been disclosed, to establish affirmatively that at least 12 jurors whose qualifications are not questioned, voted for the indictment; and protects the confidential character of grand-jury proceedings by prohibiting inquiry as to the votes of particular jurors.

The proposed legislation is in the interest of speedy and efficient administration of justice in criminal cases and is fair to the accused.

I shall appreciate it if you will reintroduce the enclosed bill and trust you may be able to give it your support.

Respectfully,

HOMER CUMMINGS, *Attorney General.*

The letter of January 17, 1934 from Attorney General Cummings to Chairman Ashurst is as follows:

January 17, 1934.

Hon. Henry F. Ashurst,
Chairman Committee on the Judiciary,
United States Senate,
Washington, D. C.

My Dear Senator:

In some criminal cases the offense is not discovered until the statute of limitations has nearly run. In other cases defendants are not apprehended for some time or removal proceedings are instituted and appeals taken from habeas corpus orders refusing to release the defendant on removal order, and in still other cases dilatory motions are made with the hope that, if ultimately sustained, the statute of limitations will meanwhile have run against another prosecution. To safeguard the interests of the Government in such cases, legislation is recommended providing that in any case in which an indictment is found defective or insufficient for any cause, after the period prescribed by the statute of limitations has run, or where said period of limitations has not run but will expire before the end of the next regular session of court, a new indictment may be returned at any time during the first succeeding term of court at which a grand jury is in session. The judicial conference favors legislation of this tenor.

A draft of bill to effectuate this recommendation is enclosed herewith and I shall appreciate it if you will introduce it and lend it your support.

Respectfully,

Homer Cummings
Attorney General.

(As quoted in *U. S. v. Durkee Famous Foods, Inc.*, 306 U.S. 68, 71 Footnote 2, [1939])

Both of these letters make clear that the U. S. Department of Justice understood the law to be that a second indictment could not be returned *after* the statute of limitations

had expired. Further, they show that the Department's view that the requested legislation would extend the statute of limitations *only* when the first indictment had been "set aside" or "found defective or insufficient for any cause".

Only a court may "find" an indictment "defective" or "insufficient", *Cf. Halling v. Board of Commissioners of City of Newark*, 95 A.2d 498, 500, 25 N.J. Super. 88; *Jones v. Stawicki*, 112 N.E.2d 886, 888, 124 Ind. App. 218.

This circuit examined the language of the predecessor statute and stated:

> Although no case has yet arisen under it, its prime purpose is clear; it is to prevent the failure of a prosectution because an indictment, found in season, proves insufficient in law. Its normal occasion will be after the defendant succeeds on demurrer, or motion to dismiss: if the error can be corrected, it will not discharge the accused. In such cases the correctness of the ruling which "finds" the indictment bad, certainly ought not to be examined again, for in most cases the prosecution cannot appeal, and the scope of the section would be greatly impaired, if it could be used only when the judge who dismissed the indictment was right. Whether the prosecution must await a move by a defendant, or whether, as here, he may move on his own initiative for a finding that the indictment is "defective or insufficient," we need not now decide; but even if he may, the finding of the court cannot be similarly conclusive--at least not in a case like that at bar. The judge found the 1934 indictment "insufficient" for no other reason than that the prosecution had discovered new principals to the crime. (*U. S. v. Strewl*, 99 F.2d 474, 476 [2d Cir. 1938])

Some attention must be accorded a decision of the Ninth

Circuit which may suggest a result contrary to the position taken by the appellants. In *United States v. Wilsey*, 458 F.2d 11 (9th Cir. 1972) the Ninth Circuit held that the filing of an indictment "tolls" the statute of limitations. However this principle is incorrectly based upon a decision of this circuit, *United States v. Feinberg*, 383 F.2d 60, 65 (2d Cir. 1967) and a decision of the District of Columbia Circuit, *United States v. Powell*, 122 U.S. App. D.C. 229, 352 F.2d 705, 707 (D.C. Cir. 1965). Neither case carefully read supports the proposition that the statute of limitations is tolled by an indictment. Both the *Feinberg* and *Powell* decisions are concerned with the issue of pre-arrest delay and in *Powell, supra*, 707 (footnote 5). The District of Columbia Circuit observed:

> ...it should be noted that an arrest does not toll the statute of limitations. Rather it is the return of an indictment which must be done before expiration of the statutory period, and this may occur before or after the arrest.

And in *Feinberg* in dealing with the pre-arrest delay issue this Court stated:

> ...the protection afforded by the statute of limitations expires because the statute of limitations only applies to a delay between the commission of the crime and the filing of the indictment... But only the lapse of time *prior to arrest* which will activate such a presumption is that established by the statute of limitations.
>
> Indeed some courts have said that the statute controls irrespective of whether there has been demonstrable prejudice. (citations omitted)(383 F.2d at 65)

Further the reasoning of *Wilsey* is illogical. If an indictment, either the filing or return, "tolled" the statute of limitations, then §3288 would never need be applied. *Cf. United States v. Durkee Famous Foods, supra; Hathaway v. United States*, 304 F.2d 5 (5th Cir. 1962), *U. S. v. Strewl*, 99 F.2d 474, cert. denied 59 S.Ct. 489, 306 U.S. 638, reh. denied 59 S.Ct. 590, 306 U.S. 668 (1938); and see *United States v. Moriarty*, 327 F. Supp. 1045, 1049 (E.D. Wisc. 1971). (Only a toll if dismissal of indictment pursuant to §3288); *United States v. DiStefano*, 347 F.Supp. 442 (S.D.N.Y. 1972)(dismissal for failure to prosecute, reindictment not possible).

The statute of limitations in numerous decisions has been liberally construed in favor of repose, "a policy that is fundamental to our society and criminal law." See *Bridges v. United States*, 346 U.S. 209, 216 (1952), *United States v. Marion*, 404 U.S. 307, 322-323 and discussion in note 14 (1971) and *United States v. Waters*, 328 F.2d 739, 742 (10th Cir. 1964). The accused is protected by the statute of limitations as his primary guarantee that stale criminal charges will not be brought against him. See *United States v. Marion, supra* at p. 322.

The superseding indictment is time barred by the statute of limitations. The conviction of the appellants must be reversed.

POINT II

THE EVIDENCE ADDUCED AT TRIAL WAS LEGALLY INSUFFICIENT TO SUPPORT THE CONVICTION OF GRADY AND JANKOWSKI WITH RESPECT TO COUNTS 2-8 and 15-17 OF THE INDICTMENT CHARGING VIOLATION OF 18 U.S.C. §922 (m)

The Entries in the Federal Firearms Record

The government, at trial, in support of the conspiracy count and the several "false entry" counts, produced evidence that defendant Jankowski sold weapons to defendant Grady and several other persons and that each person signed his true name and address for the weapons in the Federal Firearms Record (GX 9). O'Brien signed his own name and address (R. 16, T. 92). Dennehy signed his own name, his address, his social security number, and date of birth (R. 16, T. 147, 148, 153, 179). McMorris signed his own name, address, his date of birth, and his social security number (R. 16, T. 200). Casey signed his name, address and social security number (R. 16, T. 236). Subsequently, O'Brien received from either Martin Lyons or defendant Grady a transfer document indicating that he had transferred his rifles to a person named Armstrong and told to sign it which he did (R. 16, T. 81, 82). The transfer document was received in evidence (GX 10). Dennehy also received and signed a similar transfer document he received from Grady, although he could not recall the name of the individual on it (R. 16, T. 148, 149). Two months later, Dennehy received a second document from Grady in connection with a second purchase (r. 16, T. 154, 155). McMorris received and signed a

similar transfer document (R. 16, T. 190), which was received in evidence (GX 11). Casey also testified to having received a transfer document (R. 16, T. 239, 240). It is respectfully submitted that such a group sale does not constitute a violation of 18 U.S.C. §922 (m).

The Statute

The wording of the statute here in issue is as follows:

> It shall be unlawful for any licensed importer, licensed manufacturer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder. 18 U.S.C. §922 (m).

The cases which have dealt with this relatively recent statute have construed "false entries" to cover such concrete acts or omissions, as failure to record a sale, *United States v. Scherer*, 523 F. 2d 371 (7th Cir. 1975), entering phony names and addresses, *United States v. Resnick*, 488 F. 2d 1165 (5th Cir. 1974), or failure to keep inventory, *United States v. Various Firearms*, 523 F. 2d 47 (7th Cir. 1975). In addition, the United States Supreme Court has held, in *United States v. Bass*, 404 U.S. 336 (1971), that the Federal Firearms statute is to be narrowly interpreted "[b]ecause its sanctions are criminal and because, under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the States ..." 404 U.S. at 339.

The Rulings of the Trial Court

In the case at bar, Judge Brieant in several rulings

(r. 16, T. 581, 730, 915) interpreted 18 U.S.C. §922 (m) so as to make a firearms dealer responsible for keeping records with respect to the identity of subsequent transferees of the weapons in transfers in which he is in no way involved.

In response to the motion of the defendants to dismiss at the close of government's case, Judge Brieant, in denying the motion, stated:

> I think without those subsequent transfer slips . . . but I think those subsequent transfer slips are an essential part of the conspiracy which is charged, without which you might conceivably argue that the people bought the firearms and then resold them. (R. 16, T. 581)

Later, at the pre-charge conference, Judge Brieant stated:

> That is the gist of the whole conspiracy. If it were not for this evidence that these weapons had been transferred to fictitious or deceased persons . . . I would really feel constrained to dismiss the first count because I would think they had purchased them . . . The thing that makes this a subterfuge and a false record, the only thing in my mind is the fact they were taking it in all these separate names and then passing it over into deceased or non-existent persons. I think without that there is no crime on these counts. (R. 16, T. 730)

Again, in charging the jury, the Judge stated:

> In considering whether it is possible to make a false entry in a Federal firearms record by recording the true name, address, social security number, the date of birth of a person next to the serial number for the particular M-1 carbine, you may consider that activity in connection with the contention that papers were then issued to the persons who werethen listed in the log book which indicated each person had transferred his firearm to a third party at a date subsequent to purchase, and also, the statement attributed to a member of the conspiracy to the effect that those persons were deceased. (R. 16, T. 915)

The transfer documents (GX 10, 11) and the testimony concerning their use formed the evidentiary basis upon which Judge Brieant submitted the conspiracy and false entry counts to the jury. These counts charge violations of 18 U.S.C. §922 (m), 923 (g) and 26 C.F.R. §178.125 (e), which in substance require a licensed gun dealer to keep an accurate record of receipt and disposition of his firearms. In the trial, all the evidence indicated that these statutes and regulations were complied with by Jankowski who had the sole responsibility to maintain the records. As part of the sale to a group Jankowski insisted that each person as an individual sign the record in the shop (R. 16, T. 76, 77, 129). O'Brien signed his own name and address (R. 16, T. 92). Dennehy signed his own name, his address and his social security number, and date of birth (R. 16, T. 147, 148, 153, 179). McMorris signed his own name, address, his date of birth, and his social security number (R. 16, T. 200). Casey signed his name, address, his date of birth, and his social security number (R. 16, T. 236). According to senior handwriting expert, Michael McEachen, who testified for the government, defendant Grady signed his own name to the Federal Firearms Record (GX 9) without any attempt to deceive or confuse (R. 16, T. 371).

The acts which Judge Brieant regarded as rendering "false" the entries made by Jankowski in the Federal Firearms Record (R. 16, T. 581, 730, 915) occurred subsequent to the purchases (R. 16, T. 81, 149, 154, 190, 239).

Analysis of the "False Entry" Evidence

Mr. Jankowski was in no way involved with the use of the transfer documents (R. 16, T. 568). He did not receive one for the weapon he purchased (R. 16, T. 551) and he was never present at any time when these documents were discussed, produced or signed. The comment by the government in summation (R. 16, T. 801) that Jankowski invented the transfer documents because they contained "legalese" and he was a licensed gun dealer familiar with Federal regulations is pure speculation and has no basis in evidence. As for the "legalese" of Mr. Jankowski, the great difficulty this Polish-bred defendant has with basic English was clearly demonstrated during the trial (R. 16, T. 672).

These transfers were transfers of firearms from private citizens to private citizens and are outside the purview of 18 U.S.C. §922 (m). The transfer documents were not required by any law. They may have been instrument of a cover-up but they are not a violation of 18 U.S.C. §922 (m); and the attempt by the trial judge to make them such by stretching the purview of that statute is, a "bootstrap problem" (R. 16, T. 732) and a violation of the general policy of narrow interpretation of the firearms statutes spelled out by the Supreme Court in *Bass*.

At the pre-charge conference, Judge Brieant discussed the purpose of the firearms statutes (R. 16, T. 727) and stated that the actions of the defendants were "calculated to impede the government in its rights to control and check on a transfer of firearms." (R. 16, T. 728).

Here, the Court failed to appreciate that the alleged conspirators had aided the government in locating firearms by their entering true information in compliance with the statutes and regulations. By their compliance, their identity was traced without any difficulty on this record. Each man signed their respective name and entered their respective address in the Federal Firearms Record (GX 9). Thus, Casey, Dennehy, McMorris, O'Brien, and McCarthy gave to the Federal authorities all the information required by the government to accomplish the reasonable law enforcement purpose of the statute. In fact, this investigation conducted by agents Quinn and Ike did not produce its results by any spectacular sleuthing on their part, but rather it was the existence of the serial numbers and other pertinent identifying information in the Firearms Record that led the agents to the doors of Grady Casey, and the other co-conspirators who signed the Firearms Record. The purpose of 18 U.S.C. §922 (m) was achieved.

There is insufficent evidence to support the conviction of Grady and Jankowski in Counts 2-8, 15-17. The judgment of conviction should be reversed.

POINT III

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE POLICE REPORTS OF THE ROYAL ULSTER CONSTABULARY OF GREAT BRITAIN.

Certain documents of the Royal Ulster Constabulary were admitted into evidence over the objection of the defendants that the reports by police officers of Great Britain are hearsay in violation of Rule 803(8)(B) of the Federal Rules of Evidence. (R. 16, T. 438 GX 7 and 8)

The documents in question consist of two types of forms (GX 7 and 8). The first appears to be a form sent with material to be submitted for examination to the Department of Industrial and Forensic Science, Ministry of Commerce. It is signed by the person delivering and sending the material, describes the nature of material (e.g., Universal rifle, .30 caliber, serial no. 169173, and is stamped "received" with a date. Sometimes it is signed by the person receiving and returning the material, sometimes not; sometimes it includes an examination form, sometimes not.)(R. 16, GX 7, T. 431)

The second form is a Royal Ulster Constabulary report of sentence and request for disposal of firearms and ammunition signed by a constable and stamped by the Londonderry Divisional Office, accompanied by a disposal order. (R. 16, GX 8, T. 431)

The entries contained in these forms are admissible as evidence in this case. Issues of authenticity are *not* addressed. We note, however, that there is *no* evidence or showing

as to who filled in the documents in question (i.e. the identity of the out-of-court declarant) and under what circumstances (i.e. contemporaneously and/or through reports from others) (R. 16, T. 434, 436). The documents, further, clearly were not all executed in the same fashion. Thus, even assuming the general applicability of any hearsay exception, *each* document requires a showing as to the manner in which it was executed. The government failed to produce a witness with this knowledge.

The trial judge ruled that the documents were admissible for the "limited purpose" of showing the date, place of seizure, and serial number of the seized weapon:

> All right. I did take the opportunity during lunch to review some of the Congressional records on these rules, the so-called Dennis Amendment and I have reached the conclusion that notwithstanding what appears to be the literal word of that rule, that if it is read in accordance with the Congressional history it doesn't intend to abrogate Rule 27 of the criminal rules, and that I will deny the motion to strike these two exhibits.
>
> I also reiterate, however, that these exhibits are not to be taken into the jury room, so that any of the extraneous material in them can be used by anybody.
>
> The only thing they could be used for is the date, place and serial number of the weapon. None of the other material on the page will be deemed to be before the jury. So I'd like the record to be clear on that.
>
> MR. CAREY: Your Honor, it was date, serial number and --
>
> THE COURT: And the name of the city, that's all. (R. 16, T. 703)

However, this ruling permitted the very evidence which established the government's position that weapons had been exported out of the United States by inference. Thus, this limited quantum of evidence gathered by police officers in Northern Ireland established the government's position in Count 19 (the "export" count).

Rule 803 of the *Federal Rules of Evidence* lists exceptions to the hearsay rule for which the availability of the declarant is immaterial. Within this rule 803(8) provides for "public records and reports" and 803(6) "records of regularly conducted activity." Under 803(8), the following materials are admissible:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which *matters there was a duty to report, excluding, however, in criminal cases, matters observed by police officers and other law enforcement personnel*, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

The two underlined clauses were added in the 1975 revision to 803(8), which restricted the records and reports admissible. The legislative history of these amendments is unequivocal on what the intent of Congress was in so limiting 803(8). Rep. Holtzman, sponsor of the first clause ("as to which matters there was a duty to report"), pointed out that "one operating

under such a duty is far more likely to observe and report accurately." 120 Cong. Record 21 (Feb. 6, 1974), "by process or other reasonable means", suggests an intent to exclude such reports even when such exclusion means there can be no police evidence on matters contained in the reports. The right to confront one's accuser outweighs the administrative expedience of submitting official police reports rather than requiring the author of the reports to testify.

While there have not been recent cases in this Circuit which have departed from reliance on the reasoning that the right to confront witnesses in a criminal case did not necessarily apply to official records kept in the course of public duties, all of these cases pre-date the 1975 amendments. (See *Heike v. United States*, 192 F.2d 83, 94 (2d Cir. 1911). But in any event, the clear intent of the legislature to exclude law enforcement reports in criminal cases where the declarant is unavailable should control this issue.

A recent Third Circuit case, distinguishable on the facts from the instant case is *Smith v. Spina*, 477 F.2d 1140 (3rd Cir. 1973). In *Smith*, a civil action against the city of Newark and the police, police reports of plaintiff's arrest were held to be admissible. The court relied on the then current proposed amendment to 803(8), which omitted the restricting clause now in effect. The only limitation on admissibility considered here was the qualifying clause to (c) "unless the sources of information or other circumstances indicate lack of trustworthiness." The court, in its reasoning, cited an

advisory committee note on the "assumption that a public officer will perform his duty properly."

Clearly a bare assumption of trustworthiness and reliability cannot outweigh the judgment of the Congress, subsequent to *Smith*, that the defendant's right to cross-examine her or his accuser in a criminal case prevents police reports from being treated in a similar way to other official records.

The instant case is a criminal proceeding, where the police records relate to the question of defendants' guilt and therefore should be subject to stricter regulation.

Another critical difference between *Smith* and the instant case is that there was in fact an opportunity to cross-examine the authors of the report. The written reports in *Smith* were admitted after their authors had testified and before their cross-examination. In the instant case, the authors of the documents are numerous individuals in Northern Ireland whom defendants did *not* have an opportunity to cross-examine at trial. This is precisely the kind of situation to which the amendment would appear to apply.

Another recent Third Curcuit case which predates the 1975 amendment is *United States v. Thompson*, 420 F.2d 536 (3rd Cir. 1970). *Thompson* was a prosecution for unlawful possession of a sawed-off shotgun in violation of 26 USC Sec. 5851. The document in question was not actually a police record, but a certified report signed by the coordinator of the enforcement branch of the Alcohol and Tobacco Tax Division of Internal Revenue Service, which recited that he was the custodian of the

National Firearms Registration and Transfer Record (showing registration, importation, transportation, transfer and making of firearms) and that there was no record of anyone acquiring by making or transfer a weapon of the description of defendant's.

Here the defendant contended that admission of this document violated his right of confrontation. The appeals court held that the trial court's admission of the report into evidence was not error, on the grounds that it has long been held that official records kept by persons in public office in which they are required by statute or official mandate to write down particular transactions occurring in the course of their own public duties are admissible, without calling the persons who made them, as a reasonable exception to the hearsay rule.

In *United States v. Mix*, 446 F.2d 615 (5th Cir. 1971), the Fifth Circuit followed *Thompson's* reasoning that the sixth amendment right to confrontation was not violated by admission of a document executed by Internal Revenue Service officials certifying that firearms were not registered to the defendant. However, again, the case is dissimilar to the instant case. The certificate in question consisted of two pages, one signed by an IRS official to certify that the person signing the second page had custody and control of the registration record, that he was familiar with the signature and finds it to be authentic, and the second page certified t hat the individual signing it had custody and control and found no record of registration in defendant's name. The court merely quoted from the *Thompson* opinion, since the fact situation was similar (absence of the

occurrence of registration).

In neither *Thompson* nor *Mix* are the documents in question actually police or investigative records. Courts in the following cases have found arrest records and other routine police reports to be inadmissible.

In *United States v. Burruss*, 418, F.2d 677 (4th Cir. 1969), a prosecution for interstate transportation of stolen motor vehicles, the documents at issue were "theft reports" from the central records division of the D.C. Police Department. The court held that these reports were inadmissible under 28 U.S.C. Sec. 1832. The court reasoned that the person who reported the theft was "not acting in the routine of his business" and the mere fact that the recordation of such statements is routine is not a guarantee of their truth. More important for present purposes, the court said further that in a criminal case use of such records to prove the event referred to in the report deprives the defendant of his constitutionally guaranteed right to confront witnesses. The complaining witness here was not available for cross-examination. The court in *Burruss* cited numerous authorities for this position, including *United States v. Shiver*, 414 F.2d 461 (5th Cir. 1969), and *United States v. Graham*, 391 F.2d 439 (6th Cir. 1968), and held that any hearsay as to the fact of a theft was inadmissible.

In *Shiver*, *supra*, the Fifth Circuit held that police reports made in the ordinary course of business stating that a vehicle was stolen should not have been admitted for the purpose of establishing the truth of matters therein (i.e. that the car

was stolen). Again, the owner of the car did not appear at trial. The reports in this case were held to have been improperly admitted under Sec. 1732 or any other recognized exception to the hearsay rule.

In *Graham, supra*, a prosecution for transportation of stolen vehicles, the records at issue were Chicago police department stolen car reports. As in *Shiver*, the owner of the car was unavailable and the police officer who made the stolen car report would not have been permitted to testify as to what he had been told by the owner of the car for the purpose of establishing that it *had been* stolen. The report was held inadmissible for this purpose, although it could have been admitted for the purpose of establishing that the car had been *reported* stolen. The reasoning behind this limitation was that the police officer who could testify as to the second fact was available for cross-examination, while the complainant who could testify as to the first fact was not.

Some other cases in which certain police reports were held inadmissible are *United States v. Ware*, 247 F.2d 698 (5th Cir. 1957)(envelopes in which government agent allegedly purchased heroin from defendant with memos on envelopes reciting details of purchase); *United States v. Rothman*, 179 F.Supp. 935 (W.D. Pa. 1959)(state police investigatory report); *Clainos v. United States*, 163 F.2d 593, 82 U.S. App. D.C. 278 (D.C. Cir. 1947)(Picture of witness from police identification files with notations of convictions on back).

Courts have held some police records admissible, but only when offered to corroborate testimony already offered. *Ashley v. United States*, 413 F.2d 249 (5th Cir. 1969)(police report of serial numbers of stolen cineboxes where investigators received numbers by telephone but invoices corroborated report and removed taint of unreliability); *United States v. Welosyn*, 411 F.2d 550 (9th Cir. 1969)(police stolen car report used for limited purpose of confirming date testified to by another witness). In both these cases the police report merely corroborated information provided by other means--unlike the instant case, where these documents provide the only evidence of the recovery of weapons of these particular serial numbers in Northern Ireland.

There was no one who testified to the information contained in the reports who had first-hand knowledge of it and therefore can be cross-examined. Thus, the instant case is appropriate for the reasoning not only of the 1975 amendment, but also of the earlier cases in which such reports were found inadmissible because of the lack of opportunity to cross-examine whether the report would be considered admissible as a "public record" under 803(8) or a "business record" under the common law.

As to the possibility that these documents fall under the 804(b)(5) "other exceptions" provision -- first, this residual exception was intended to be used "very rarely and only in exceptional circumstances"; second, it was "not intended to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action." (Senate Report at pp. 18-20);

and third, there is a strict notice requirement.

> ...a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

In conclusion, the admission of these Foreign police reports was error, and violated Rule 803(8)(B) of the Federal Rules of Evidence. The conviction should be reversed.

POINT IV

THE TRIAL COURT ERRONEOUSLY PERMITTED "SUBSEQUENT SIMILAR ACTS" TESTIMONY

In a case, such as this one, where the danger of inflaming the jury is great, the trial cour erred egregiously in permitting irrelevant "subsequent similar acts" testimony. The government's purpose in offering this testimony was solely to prove the criminal prospensity or character of Grady.

More than a year after the acts charged in the indictment, John Casey describes a visit in summer of 1971 with Grady to an apartment in Bronx, New York. In the basement Casey saw two trunks and one trunk was open and full of rifles and handguns of World War II vintage (R. 2, T. 259, 325) Casey told of another incident even later in time, when in the fall of 1971 Casey went with Grady to a house in Somerville Place, Yonkers and Casey saw a crate being assembled with plywood two by fours. Casey saw carbines, rifles and handguns being loaded into the crate, and then helped Grady carry out the crate to Grady's station wagon. Casey had heard from Grady that Lyons took possession of these fifteen to twenty rifles (R. 2, T. 255, 257). Judge Brieant ruled that he would give a limiting instruction that the contested evidence related only to Grady and Count 19 but would not grant defendants motion to strike this testimony:

> THE COURT: There is evidence of course as far as that goes that he never had any expert license. I believe that I should give a limiting instruction as to this testimony. I don't believe I am required to strike it out because it probably is admissible as bearing upon his intent, motive, and so forth; and it also of course corroborates Casey's presentation of

himself as a full fledged member of whatever group of people was dealing with these rifles. So it had bearing on the weight to be given to Casey's testimony. (R. 16, T. 755)

In *United States v. Byrd*, 352 F. 2d 570 (2d Cir. 1965) this court stated:

> It is, of course, conceivable that in some cases proof of the offenses charged would contain little or nothing from which an inference of guilty intent could be drawn. In such a case a trial judge would, in the exercise of his discretion, be justified in admitting as part of the Government's case, proof of a prior similar offense to show knowledge or intent. For the present purpose of this discussion it is enough to point out that the scope of discretion does not include every offer of a prior similar offense which may contribute something to a showing of intent in the Government's main case. Where the prejudice is substantial and the probative value, through the nature of the evidence or the lack of any real necessity for it, is slight, its admission at that stage may be held to be an abuse of discretion. Under such circumstances the better practice would be to sustain the ofjection to the offer on the Government's main case without prejudice to its re-offer in rebuttal, if then warranted.
> (*United States v. Eyrd*, Supra at p. 575)

The testimony would have been relevant to an issue of mistake, but the entering of a not guilty plea is not sufficient to raise the issue of wilfullness and intent. See *United States v. Fierson*, 419 F. 2d 1020, 1023 (7th Cir. 1969); but see *United States v. Berlin*, 472 F. 2d 1002, 1006 (2d Cir. 1973)(Where essential element of crime charged is intent or guiltly knowledge).

Evidence of the propensity to commit the crime charge is permissible in this circuit only to counter a defense. See *United States v. Koska* , 443 F. 2d 1167 (2d Cir. 1971) (defense of entrap-

ment). "Propensity" evidence was not proper in this case since this question was not presented by the defense. Whether the "propensity" of *Jankowski* was put in issue by his testimony was an issue which could have been resolved on the government's rebuttal case. See *United States v. Byrd*, *supra* at p. 575. However, the government offered the Casey testimony concerning the World War II guns and the "Sommerville Place" to show *Grady's* criminal propensity.

In sum, the "subsequent similar acts" testimony bearing on Grady's criminal propensity was plainly irrelevant and could serve to inflame and prejudice the defendants. This calculated effort to arouse the jury's passions and to inflame its instincts prevented the jury from focusing its attention on the elements of the charge, and must not be countenanced. See *Ralls v. Manson*, 375 F. Supp. 1271, *reversed on other grounds*, 503 F. 2d 491 (1st Cir. 1974); *cf. United States v. White*, 486 F. 2d 204, 206 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974). Here the prejudicial potential of this testimony solely to prove the criminal character of Grady outweighed its probative value and should not have been permitted. See *United States v. Papadakas*, 510 F. 2d 287, 294 (2d Cir. 1975), *cert. denied* 95 S. Ct. 1682.

POINT V

THE COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD CONVICT GRADY OF EXPORTING WITHOUT A LICENSE BY FAILING TO INSTRUCT THAT GRADY HIMSELF DID NOT REQUIRE A LICENSE AS AN AIDER AND ABETTOR

Judge Brieant erred in his instruction to the jury with respect to Count 19 which charged only Grady with aiding and abetting the export of ten weapons from the United States without having first obtained a license. 22 U.S.C. §1934, C.F.R. §121 *et. seq.*; 18 U.S.C. §2 when he charged the third element of the "export" as follows:

> And third, that Mr. Grady exported these firearms without first having obtained a license therfor or written approval therefor from the Department of State or an exemption from those requirements . . . As to the third element, there is evidence, specifically Government's Exhibit 5 and 6, from which the Jury might conclude *Mr. Grady* did not have either a license to export or written approval to export, from the Department of State, or an exemption from these requirements. If you find beyond a reasonable doubt that *Mr. Grady* had no license or written approval or exemption from these requirements then the third element of this count has been met. (R. 2, T. 928, 929)

There was evidence to infer that Lyons had exported the Count 19 weapons and Grady aided and abetted Lyons (R. 2, T. 241, 263). No proof was offered by the government that Lyons had no license to export (R. 2, GX 5-6). Judge Brieant was requested to charge that the exporter of the weapons must not have a license. (R. 2, T. 938). Judge Brieant did state in his charge that Lyons

was the probable exporter, but did not make clear that the jury must find that Lyons exported without a license in order to find Grady guilty of aiding and abetting an unlawful export:

> Once again I must remind you, you can only find Mr. Grady guilty on Count 19 if you are satisfied that the Government has proven all four elements of the offense as I have explained them to you beyond a reasonable doubt. You can infer that the defendant knowingly and wilfully aided in the export of these articles, these rifles, if you find that he had said that he had done so, and if you find at a particular point in time that these particular rifles were in Yonkers in his possession and were later found in Northern Ireland, even if you think that the actual exporting was done by Martin Lyons, or by unknown persons, providing that the exporting was unlawful and done without a license. (R. 16, T. 930, 931)

The error in the charge of exporting firearms without a license was a failure to properly state the law, and resulted in prejudicial confusion to the jury. See *United States v. Allied Stevedoring Corp.*, 241 F. 2d 925, *cert. denied*, 77 S. Ct. 1282, 353 U.S. 984 (1957); *United States v. Grunewald*, 233 F. 2d 556, *reversed on other grounds*, 72 S. Ct. 775, 353 U.S. 391 (1957). The conviction should be reversed with respect to Count 19.

CONCLUSION

FOR THE REASONS STATED ABOVE, WE RESPECTFULLY SUBMIT THAT THE CONVICTION OF DEFENDANTS FRANK GRADY AND JOHN JANKOWSKI SHOULD BE REVERSED.

Dated: New York, New York
June 25, 1976

Respectfully submitted,

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